In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-667

FRANK A. ANGLIN, JR., PETITIONER

v.

STEVEN JOHNSTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that a prisoner serving a federal criminal sentence may not be confined for civil contempt for his refusal, despite immunity, to testify before a grand jury, when the service of his criminal sentence is suspended during his civil contempt confinement.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of theft from an interstate shipment and illegal use of firearms. On February 23, 1973 he was sentenced to three years' imprisonment, later modified to allow immediate eligibility for parole pursuant to 18 U.S.C. 4208(a)(2).

In May 1973, petitioner was returned to the Northern District of Illinois, granted testimonial immunity pursuant to 18 U.S.C. 6002 *et seq.*, and brought before a special

grand jury. He refused to answer questions and was thereupon adjudged in contempt of court and committed to the custody of the United States Marshal until such time as he purged himself of the contempt. Petitioner was incarcerated in the Cook County, Illinois jail pursuant to the civil contempt order.

Subsequently, the United States Board of Parole informed him that, in accordance with Bureau of Prisons policy,[1] his criminal sentence had been suspended for the duration of the contempt incarceration and that time served for the contempt would not be counted toward any other sentence. On May 1, 1974, the district judge who had held petitioner in contempt entered an order stating that his "intention was that any time served by [petitioner] for civil contempt was not to be counted toward the service of his criminal sentence * * *" and that "while [petitioner] is confined pursuant to this order his criminal sentence * * * shall be and hereby is ordered suspended and held in abeyance" (Pet. App. 3).

Meanwhiie, on April 17, 1974, petitioner filed an application for a writ of habeas corpus seeking an opportunity to appear before the parole board, credit against his criminal sentence for time served pursuant to his contempt commitment, and his return to the federal penitentiary for concurrent service of the civil contempt and criminal sentences. The district court denied relief, stating that "the granting of the petitioner's requests * * * would remove the incentive [to testify] in contravention of congressional intent." *Anglin* v. *Johnston,* 378 F. Supp. 750, 751 (N.D. Ill.). The court of appeals affirmed (Pet. App.).

---

[1]This was later formalized in Bureau of Prisons Policy Statement No. 7300.92, issued November 13, 1973.

1. Petitioner does not challenge the district court's power, in the face of an unjustified refusal to testify, to confine a recalcitrant witness for civil contempt in order to compel compliance with the court's order. The sole issue presented is whether a prisoner's criminal sentence can be suspended during the period of confinement for civil contempt.

Section 301(a) of Title III of the Organized Crime Control Act of 1970, 84 Stat. 932, 28 U.S.C. 1826(a), provides that a witness "in any proceeding" who refuses to testify before a court or grand jury may be confined "until such time as the witness is willing to give such testimony." Its history shows that this procedure was "designed to codify present practice." See H. Rep. No. 91-1549, 91st Cong., 2d Sess., p. 46. This statute thus reflects the inherent powers of a court to enforce compliance with its lawful orders through civil contempt. *Shillitani* v. *United States*, 384 U.S. 364, 370; *Ex parte Robinson*, 19 Wall. 505, 510. There is no suggestion in the legislative history that this coercive power was not to be made applicable to persons already incarcerated. In *United States* v. *Liddy*, C.A.D.C., No. 73-1564, decided December 12, 1974, the court of appeals rejected an argument similar to that made here (slip op., p. 12):

> The coercive impact of confinement for civil contempt results from the fact that the contemnor "carries the key to the jailhouse door in his pocket," that is, he can procure his release at any time by agreeing to comply with the court order whose violation is the basis of his contempt. Had the District Court ordered that Liddy's contempt confinement be concurrent with his sentence for Watergate crimes, Liddy would have no incentive to comply with the District Court's order since his doing so would not reduce his total period of confinement.

2. Nor does 18 U.S.C. 3568, governing the computation and service of criminal sentences, limit the court's power to coerce compliance with a lawful order.[2] The statute's legislative history reveals that it was intended to provide certainty as to when a sentence commences and to preclude the award of credit for time spent in custody prior to commencement of sentence.[3] Neither purpose conflicts with the action in the present case.

As the District of Columbia Circuit recognized in *United States* v. *Liddy, supra,* "when Congress enacted section 3568, it was primarily concerned with the commencement date of a sentence, not with its subsequent calculation and termination date" (slip op. at 11).

This Court, to be sure, frequently has expressed reluctance to permit interference with the terms of a sentence already being served. See, *e.g., Ex parte Lange,* 18 Wall. 163, *United States* v. *Murray,* 276 U.S. 347; *United States* v. *Benz,* 282 U.S. 304. But different principles govern an interruption of sentence, as opposed to an alteration of the terms of a sentence. Contrary to peti-

---

[2]18 U.S.C. 3568 provides in pertinent part:

> The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. * * *
>
> * * * * *
>
> No sentence shall prescribe any other method of computing the term

[3]S. Rep. No. 803 and H. Rep. No. 960, 72d Cong., 1st Sess. See also, 75 Cong. Rec. 10352.

tioner's contention (Pet. 10-12), a delay in the execution or continuity of a criminal sentence is not tantamount to a prohibited increase in punishment.[4]

Courts have long recognized that a federal criminal sentence may be interrupted because of the prisoner's wrongful act. The "fault" of the prisoner causing an interruption may be an escape, *Theriault* v. *Peek*, 406 F.2d 117 (C.A. 5), certiorari denied, 394 U.S. 1021; a violation of parole, *Anderson* v. *Corall*, 263 U.S. 193; or, as here, an incarceration for illegal actions different from those for which the prisoner was originally sentenced, *McDonald* v. *Lee*, 217 F.2d 619 (C.A. 5), vacated as moot, 349 U.S. 948.[5]

---

[4]Petitioner's reliance on *Crowe* v. *United States*, 200 F.2d 526 (C.A. 6), is misplaced. There the district court had suspended concurrent three- and five-year prison terms and placed Crowe on probation commencing "from and after the expiration of" a previous sentence. Seven months after Crowe's first sentence expired, his parole was revoked and he was ordered to begin serving the concurrent prison sentences. The Sixth Circuit held that, by the literal terms of the sentencing court's order, the concurrent sentences began on the day the earlier term expired, and could not be increased by seven months. Here, no comparable order fixes the boundaries of petitioner's sentence. See *United States* v. *Liddy, supra*, slip op. at 8, n. 16. *Rutledge* v. *United States*, 146 F.2d 199 (C.A. 5), in which a district court, having sentenced appellant to concurrent prison terms for separate offenses, was held powerless to order the terms to run consecutively once the appellant had begun serving the sentences, is similarly inapposite.

[5]*McDonald* v. *Lee, supra*, upheld interruption of the sentence of a military prisoner to serve a sentence for misconduct in prison, stating (217 F.2d at 623): "At common law a prisoner has a right to serve his sentence continuously, and cannot be required to serve it in installments, but even at common law a continuous sentence may be interrupted by some fault of the prisoner."

In the case at bar petitioner's recalcitrance was no less a "fault" than an escape or parole violation and requires no different treatment. As the court of appeals correctly stated (Pet. App. 9, n. 5): "Just as the prisoner procures his own escape or voluntarily violates probation or parole, he brings about his own confinement by his continued refusal to answer questions under immunity." His status as a federal prisoner does not immunize him from the consequences of his wrongful act. The legislative history of Section 3568 (*supra*, p. 4) certainly shows no intent to create such an immunity from the sanction of civil contempt.

3. Finally, the existence of the criminal contempt remedy does not negate a court's power to fashion effective civil contempt remedies against a recalcitrant federal prisoner. While a criminal contempt conviction satisfactorily punishes a contumacious refusal to testify, its primary purpose is not to induce the contemnor to relent and yield the evidence sought by the grand jury. Moreover, an insistence that only criminal contempt can be used against recalcitrant federal prisoners would reverse the traditional maxim that a court should exercise "the least possible power adequate to the end proposed," *Anderson* v. *Dunn*, 6 Wheat. 204, 230-231. As the District of Columbia Circuit recognized in *United States* v. *Liddy*, *supra*, slip op. at 13-14:

> While the District Court's power to punish Liddy for criminal contempt is uncontested, there are limitations on the criminal contempt device that make us reluctant to insist that the District Court employ it here. First, criminal sanctions are extreme measures to which "[t]he judge should resort * * * only after he determines, for good reason, that the civil remedy

> would be inappropriate." [*Shillitani* v. *United States*, 384 U.S. 364, 371 n. 9.] Second, a judgment of criminal contempt results in a fixed sentence that the contemnor must serve regardless of whether he subsequently purges his contempt by complying with the District Court's order. Consequently, the coercive element inherent in civil contempt is lost when resort is had to criminal contempt. [Footnotes omitted.]

We submit, therefore, that the district court did not exceed its authority in adjudging petitioner in civil contempt and that his criminal sentence was properly stayed during the period of his incarceration for civil contempt.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.